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No. 304

In the Supreme Court of the United States

OCTOBER TERM, 1960

KEMP A. HARRISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 22–29) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1960. Petitioner's motion for rehearing was denied on July 13, 1960 (Pet. 20). The petition for a writ of certiorari was filed on August 9, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was error in the charge on intent.
2. Whether the denial of a requested charge con-

cerning the weight to be given evidence of good character was error in the light of the charge actually given.

3. Whether the trial court abused its discretion in denying the petitioner's motion for a mistrial.

STATUTES INVOLVED

The relevant statutes provide in pertinent part:

18 U.S.C. 1001.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. 1005.

Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or other com-

pany, body politic or corporate, or other individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

In the United States District Court for the Middle District of Georgia, the petitioner, a director of the Citizens State Bank of Warner Robins, Georgia, and Fountain, the president of the bank, were convicted on counts three and four of a four-count indictment. Count three charged the wilful concealment of material facts within the jurisdiction of the Federal Deposit Corporation in violation of 18 U.S.C. § 1001 (R. 8–10). Count four charged issuance of a bill of exchange without the authority of the directors of the bank, in violation of 18 U.S.C. § 1005 (R. 10–11). The petitioner was sentenced generally to serve a year and a day and fined $5,000 (R. 642–643). On appeal the judgment was affirmed.

1. The evidence may be summarized as follows:

The petitioner was the Mayor of Warner Robins, Georgia, and sole proprietor of the Victory Drug Store, as well as a director of the Citizens State Bank (R. 352–353). The petitioner had maintained accounts at the Citizens State Bank for several years and had borrowed from the bank on several occasions (R. 356).

On November 12, 1957, the Board of Directors of the Citizens State Bank, at a meeting attended by the petitioner, adopted a regulation that the amount of direct and indirect credit obtained by a member of the board from the bank would be limited to $45,000, with indirect credit not to exceed $30,000 and direct credit not to exceed $20,000 at any time (R. 86, 354). At a meeting on January 14, 1958, at which the petitioner was also present, the Chairman of the Board advised the directors that they must reduce their accounts to $20,000 immediately (R. 357–358).

On January 17, 1958, the petitioner owed the Citizens State Bank $35,500—$6,600.85 of which was due to an overdraft in a checking account of Victory Drug Store (Pet. 8; R. 51). On that day the petitioner gave Fountain a 90-day note in the name of the City of Warner Robins for $20,000 (R. 360) and received in exchange from Fountain a cashier's check for $19,700[1] payable to the City of Warner Robins, Water and Sewer Expansion Fund (R. 360). The check was endorsed by petitioner "City of Warner Robins, Water and Sewer Expansion Fund, Kemp A. Harrison, Mayor" (R. 384). The proceeds were applied to the petitioner's indebtedness, and the Victory Drug Store checking account, eliminating the overdraft and leaving a cash balance (R. 211–212).

The loan was not presented to the Discount Committee of the Citizens State Bank until January 21, 1958 (R. 57–58), at which time neither the petitioner nor Fountain revealed that the transaction was anything other than a bona fide loan to the City of War-

[1] The difference between the amount of the note and that of the check was a prepayment of interest on the loan (R. 50).

ner Robins Water and Sewer Expansion Fund (R. 269–270). The loan was made without the knowledge of the City Council of Warner Robins (R. 145) and none of the money from the loan was deposited in the account of the Water and Sewer Expansion Fund (R. 52, 273).

At a meeting of the City Council called in February, 1958, to investigate rumors that such a loan had been made, the petitioner admitted that he had executed the note and used the proceeds to reduce his indebtedness to the bank (R. 142–143, 371). At the trial the petitioner testified on direct examination that his purpose in making the loan in the name of the City of Warner Robins was "for reducing an overdraft and also my normal loan accounts at the Citizens State Bank; which I had been reprimanded by the chairman of the board and asked to do immediately" (R. 366).[2]

2. Count three charged that defendants "knowingly and wilfully" covered up by scheme and device material facts in a matter within the jurisdiction of the Federal Deposit Insurance Corporation. In submitting the case to the jury, the judge charged that wilfully meant that the act was done "deliberately, with knowledge, and not done accidentally" (R. 611). He told the jury that to find the defendants guilty on

[2] When questioned by an agent of the F.B.I., in September, 1958, the petitioner initially explained that he had used the proceeds of the loan to make a deposit on water pipe for the city, and that he had used cash to pay his personal loans to the bank. The two transactions were described as being unrelated save for a common date (R. 66–69). This version of the transaction also appeared in a newspaper "explanation" made by the petitioner (R. 374–375). On the witness stand the petitioner described this story as a "political cover-up" (R. 375)

count three they must find that the defendants "intended to falsify, conceal and cover up" material facts within the jurisdiction of the F.D.I.C. (R. 608).

Count four charged that 18 U.S.C. 1005 was violated in that defendants wilfully made a loan without authority from the directors "with the intent to defraud" the bank (R. 11). The judge charged the jury that intent to defraud had to be found (R. 609). As to intent he said (R. 609–610):

> I have used here several times the word "intent". Members of the jury, intent is a material element in all of these counts charged in this indictment, and it must be proved beyond a reasonable doubt before you can convict. Intent is something, of course, that exists in a man's head, in his mind. It is impossible for you, as jurors to enter into the mind of the Defendants and to determine what they intended be done. Generally, we have some guides well established, however, to assist you in that regard. Generally, for example, it is presumed that one intends the consequences of his act. His intent has to be judged, at least, by his intelligence, as shown by the evidence; his experience in life and knowledge, as shown by the evidence; and generally by judging him as a reasonably prudent man experienced in every day affairs of life, as shown by the evidence, and as such men judge each other in their every day relationship with one another. And it is the law that a person intends the usual and probable consequences of his act.
>
> Intent may be shown by either circumstantial evidence or direct evidence, as the case may be.

Later, dealing specifically with "intent to defraud", he said (R. 611–612):

> * * * Counts One and Four, but not Count Three, of the indictment, allege that the Defendants did "with intent to defraud" commit the alleged acts. The terms "with intent to defraud" means with an evil and unlawful purpose, characterized by trickery and with intent to cheat and cause loss to the bank. * * *
>
> An[d] on the matter of intent, with reference to Count Four of the indictment, I charge you, members of the jury, that if you conclude from the evidence in this case that the Defendants in good faith thought that the Defendant, Harrison, as Mayor of the City of Warner Robins, had authority to execute the promissory note involved in this case for which the cashier's check involved was issued, you would not be authorized to convict the Defendants on that count; but, on the contrary, it would be your duty to return a verdict of not guilty as to both of them.
>
> By the same token, if you find from the evidence in the case that the Defendant, Harrison, in good faith, thought that he had the authority to bind the City of Warner Robins in this transaction on January 17, 1958, by the same token, it would be your duty to acquit him with reference to Count Four.

As to count four, the court of appeals was of the opinion that, if specific intent to defraud the bank were an element of the crime, it would have been error to charge that a man is presumed to intend the consequences of his act, but that, on this count, there was no error since the statute did not require intent

to defraud and, in requiring the jury to make such a finding, the trial court was more favorable to the petitioner than was required.

It found the evidence sufficient to make out a scheme and device as charged in count three.

ARGUMENT

1. a. The issues which the petitioner attempts to raise with respect to the judge's charge on intent are not really in the case. As to count three, laid under 18 U.S.C. 1001, the court below did not rule that intent was not an element of the offense. The court of appeals held only that no specific criminal intent to defraud was required for conviction under count three (Pet. 24, 26). The trial judge carefully charged that "intent is a material element in all of these counts charged in this indictment, and it must be proved beyond a reasonable doubt before you can convict" (R. 609). The jury was instructed that in order to convict the petitioner on count three they must find beyond a reasonable doubt that petitioner "knowingly and wilfully" concealed by trick, scheme or device material facts, and that in so doing he "intended to falsify, conceal and cover up by trick, scheme or device such material facts in such material matter from the FDIC" (R. 608).

The predecessor of Section 1001 of Title 18 was 18 U.S.C. (1940 ed.) 80. See Reviser's Note, 18 U.S.C. 1001 (1958). This Court construed that statute as prohibiting any knowing and wilful misrepresentation with respect to a matter within the jurisdiction of any department or agency of the United States. *United*

States v. *Gilliland*, 312 U.S. 86. Where a statute makes it criminal "knowingly and wilfully" to commit the interdicted act, it is enough to sustain a conviction if the petitioner intentionally, as distinguished from accidentally, commits the proscribed act in careless disregard of whether he has the right so to act. *United States* v. *Murdock*, 290 U.S. 389, 394–395. The courts have held that the word wilful in Section 1001 means no more than that the forbidden act is done deliberately and with knowledge. *E.g. Corcoran* v. *United States*, 229 F. 2d 295, 299 (C.A. 5); *McClanahan* v. *United States*, 230 F. 2d 919, 924 (C.A. 5), certiorari denied, 352 U.S. 824; *McBride* v. *United States*, 225 F. 2d 249, 253–255 (C.A. 5), certiorari denied, 350 U.S. 934; *Walker* v. *United States*, 192 F. 2d 47, 49 (C.A. 10). The trial judge here so charged (R. 611).

The evidence fully supports the finding that the petitioner's acts were wilfully done. The petitioner's own statement clearly showed that the purpose of the entire loan transaction in the name of the City of Warner Robins was a trick to conceal the fact of the petitioner's excessive indebtedness to the Citizens State Bank (R. 358–361, 453, 143–145). He knew that what was in fact his debt would be carried on the books as a debt by the City. The scheme was therefore a trick or device to conceal the true facts from the bank and the F.D.I.C.

Since the sentence was a general one, it is supported by the verdict on count three alone. *Pinkerton* v. *United States*, 328 U.S. 640, 641–643; *Claassen* v. *United States*, 142 U.S. 140, 146–147.

b. In any event, there was no error with respect to the instructions on count four. The court of appeals was undoubtedly correct in its ruling that intent to defraud the bank is not an element of the offenses defined in the first two paragraphs of 18 U.S.C. 1005 (*supra*, p. 2). The requirement of "intent to injure or defraud such bank" occurs in the middle of the paragraph relating to false entries and cannot by any reasonable construction be related back to the prior paragraphs. But that issue also is not here for the judge did charge on specific intent.

Reading the instructions as a whole, it cannot be said that the jury were instructed that the specific intent to defraud could be based merely on the general principle that a man is presumed to intend the natural consequences of his act. The judge used that phrase in his general discussion of how a jury could judge the mental process of a defendant. But, as noted in the Statement (*supra*, pp. 6–7), he later, with respect to count four, gave very specific instructions as to what was meant by intent to defraud the bank and made it clear that the defendants could not be convicted unless they did have "an evil and unlawful purpose, characterized by trickery and with intent to cheat and cause loss to the bank" (R. 611).

2. The petitioner contends (Pet. 14) that the trial judge erred in refusing a requested charge "that evidence of good character of defendants in a case such as this may alone be sufficient, in and of itself and by itself, to generate and create a reasonable doubt of the guilt of the defendants, requiring their acquittal, although without such evidence of good character the

other evidence in the case might be convincing as to their guilt." (R. 43.) The instruction given by the trial judge stated that "[g]ood character is a positive, substantive fact and may in and of itself be sufficient * * * if it is proven to exist, to generate in the minds of the jury a reasonable doubt as to the guilt of a defendant. If the jury should think, from all of the evidence together, that notwithstanding the evidence of good character, the Defendants nevertheless did what they are charged with doing, then you ought to convict them. In other words, a jury would not be authorized to acquit solely because of the evidence of good character" (R. 614).

This charge accords with the established law with respect to the weight to be given evidence of good character. See, *e.g., Michelson* v. *United States,* 335 U.S. 469, 476; *Edgington* v. *United States,* 164 U.S. 361. When a jury has been properly instructed on the law on a given subject, the trial judge is not required to grant the specific charge requested by the defendant. *Agnew* v. *United States,* 165 U.S. 36; *Sandy White* v. *United States,* 164 U.S. 100.

3. On the morning of the second day of the trial, the petitioner moved for a mistrial on the grounds of improper influence upon the jury by the United States Attorney. It was alleged that at the beginning of the trial, when the jury was being seated, the United States Attorney directed a Negro male juror away from a seat beside a white female juror for the purpose, and with the result, of ingratiating himself with the white jurors, there being ten white and two Negro persons on the jury. The court denied the motion on

the grounds that the act of which the petitioner complained had neither the purpose nor the result imputed by the petitioner, pointing out that if the act carried the imputations suggested by the defense, it could have prejudiced two jurors (R. 202–206). The purpose and nature of the alleged act are completely conjectural and the determination of whether an act has resulted in influencing a jury rests within the sound judgment of the trial court. See *Holmgren* v. *United States*, 217 U.S. 509.

CONCLUSION

The decision below is correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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